FILED
MAY 12 1992
OFFICE OF THE CLERK

No. 91-1697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANCIS EDWIN BASS, JR., *et al.*,
Petitioners,

v.

STATE OF SOUTH CAROLINA, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOE L. ALLEN, JR.*
RAY N. STEVENS
ARLENE D. HAND
PO Box 125
Columbia, SC 29214
(803) 737-4430
Attorneys for Respondents

*Counsel of Record

QUESTIONS PRESENTED

1. Was the holding of the Honorable South Carolina Supreme Court that denied the refunds premised upon adequate and independent state grounds?

2. Was the decision of the Honorable South Carolina Supreme Court "essentially arbitrary or a mere device to prevent the review of the decision upon the federal question?"

3. Is the decision of this Honorable Court in *Davis v. Michigan Department of Revenue*, 489 U.S. 80, 109 S.Ct. 1500, 103 L.Ed. 2d 891 (1989) to be applied prospectively or retrospectively?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Arguments

I. The Petition Should Be Denied Because The Decision Of The South Carolina Supreme Court Is Founded Upon Adequate And Independent State Grounds. 1

II. The Decision Of The South Carolina Supreme Court Is Not Arbitrary As Contended By The Petitioners. Instead, It Is Founded On Established Precedent. 3

III. The *Davis* Decision Is To Be Prospectively Applied. 5

Conclusion 11

TABLE OF AUTHORITIES

Page

American Trucking Association, Inc. v. Smith,
110 S.Ct. 2323 (1990) 6, 7, 8

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263,
104 S.Ct. 3049, 82 L.Ed 2d 200 (1984) 6

Bass v. State (Bass I), _____ S.C. _____,
395 S.E. 2d 171 (1990) 1

Bass v. State (Bass II), _____ S.C. _____,
414 S.E. 2d 110 (1992) 1

James B. Beam Distilling Co. v. Georgia,
501 U.S. _____, 111 S.Ct. 2439 (1991) 6, 11

City of Columbia v. S.C. Public Service Commission,
242 S.C. 528, 131 S.E. 2d 705 (1963) 5

Davis v. Michigan Department of Revenue, 489 U.S. 80,
109 S.Ct. 1500, 103 L.Ed. 2d 891 (1989) ..... passim

Elmwood Cemetery Association v. Wasson, 253 S.C. 76,
169 S.E. 2d 148 (1969) 2

Federal Crop Insurance Corporation v. Merrill,
332 U.S. 380, 68 S.Ct. 1 (1947) 4

Heyward v. South Carolina Tax Commission,
240 S.C. 347, 126 S.E. 2d 15 (1968) 4

Lampf, Pleva, Lipkind, Prupis and Petigrow v.
Gilbertson, 111 S.Ct. 2773 (1991) 2

Lee v. Michigan Millers Mutual Insurance Co.,
250 S.C. 462, 158 S.E. 2d 774 (1968) 4

TABLE OF AUTHORITIES — continued

Page

McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 110 S.Ct. 2238 (1990) 2

Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) 1

Roswell v. LaSalle National Bank, 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed. 2d 464 (1981) 2

Sandstrom v. Chemlawn Corp., 904 F.2d 83 (1st Cir. 1990) 10

Scott v. South Carolina Tax Commission, 262 S.C. 144, 202 S.E. 2d 854 (1974) 10

Stone v. White, 301 U.S. 532, 57 S.Ct. 851, 81 L.Ed. 1265 (1937) 8, 9

United States, et al. v. Carrick, et al., 298 U.S. 435, 56 S.Ct. 829 (1936) 5

United States v. Jefferson Electric Mfg. Co., 291 U.S. 386, 54 S.Ct. 443, 78 L.Ed. 859 (1934) 8

United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 67 S.Ct. 601 (1947) 4

United States v. Stewart, 311 U.S. 60, 61 S.Ct. 102 (1940) 4

Constitution and Statues:

S.C. Code Ann. Section 12-47-210 (1976) 1, 2, 5

S.C. Code Ann. Section 12-47-220 (1976) 1, 2, 5

S.C. Code Ann. Section 12-47-440 (1976) 4

TABLE OF AUTHORITIES - Continued

Other Authorities:

Black's Law Dictionary 9

8A S.C. Digest, *Equity*, Key 64 10

West's Federal Digest, *United States*, Key 40 4

STATEMENT OF THE CASE

In *Bass v. State* (Bass I), _____ S.C. _____, 395 S.E. 2d 171 (1990), the South Carolina Supreme Court's principal ground for denying the refunds was that *Davis v. Michigan Department of Revenue*, 489 U.S. 80, 109 S.Ct. 1500, 103 L.Ed. 2d 891 (1989) was to be prospectively applied. The court did provide that should it consider state law, the refunds would be denied because the petitioners did not proceed under the proper remedy by paying the tax under protest. S.C. Code Ann. § § 12-47-210 and 12-47-220 (1976).

On remand by this Honorable Court, the South Carolina Supreme Court founded its Order upon adequate and independent state grounds. *Bass v. State* (Bass II), _____ S.C. _____, 414 S.E. 2d 110 (1992). It further concluded that *Davis* was to be prospectively applied. It is from this Order that the petitioners now seek review.

ARGUMENT I

THE PETITION SHOULD BE DENIED BECAUSE THE DECISION OF THE SOUTH CAROLINA SUPREME COURT IS FOUNDED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS.

Under *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed. 2d 1201 (1983), the requirement is for a plain statement that the State Court's decision rests upon adequate and independent state grounds.

The South Carolina Supreme Court clearly complied with this requirement. It held:

> Initially we note that our decision to affirm *Bass I* is based primarily on the adequate and independent

> state ground that the federal retirees are procedurally barred from recovery because they failed to proceed under applicable state statute.

The court later in its conclusion restates the above. The pay under protest with the right of action to recover is an adequate remedy that satisfies constitutional requirements. *Roswell v. LaSalle National Bank*, 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed. 2d 464 (1981); *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 110 S.Ct. 2238 (1990). This remedy has also been held by the South Carolina Supreme Court to be adequate. *Elmwood Cemetery Association v. Wasson*, 253 S.C. 76, 169 S.E. 2d 148 (1969).

Before concluding this argument, the court's attention is called to the case of *Lampf, Pleva, Lipkind, Prupis and Petigrow v. Gilbertson*, 111 S.Ct. 2773 (1991). There the court adopted a new limitation period and applied it to the parties. The result was that the action was untimely instituted. The petitioners submit this decision in support of their contention that *Davis* is to be retrospectively applied. The respondents, however, submit that this decision convincingly supports the decision of the South Carolina Supreme Court that resolved the issue on adequate and independent state grounds.

This Honorable Court there reviewed the applicable procedure under which those parties could have proceeded in Federal Court. The Court adopted a procedure that overruled long-standing judicial interpretation. The South Carolina Supreme Court, on an issue of first impression, looked to the substantive law of the state to determine the appropriate procedure the petitioners were required to follow. It held that §§ 12-47-210 and 12-47-220 were the petitioners' adequate and exclusive remedies. *Lampf* therefore supports the decision of the South Carolina Supreme Court.

By reason of the above, the petition should be dismissed and this action ended.

ARGUMENT II

THE DECISION OF THE SOUTH CAROLINA SUPREME COURT IS NOT ARBITRARY AS CONTENDED BY THE PETITIONERS. INSTEAD, IT IS FOUNDED ON ESTABLISHED PRECEDENT.

It is difficult to understand the petitioners' contention that the South Carolina Supreme Court acted in an arbitrary manner or device so as to preclude the review by this court. One would have to be totally removed from reality not to know that the petitioners would seek review by this court. The South Carolina Supreme Court was undoubtedly aware of this reality.

The South Carolina Supreme Court upon remand directed the parties to rebrief the issues. The parties were afforded the opportunity to file Appellant, Respondent and Reply Briefs. The petitioners' present contention was fully briefed by the petitioners. The court further directed oral argument wherein the petitioners again presented their position on this contention.

It is further apparent that the South Carolina Supreme Court gave serious consideration to this issue because a substantial part of its Order is devoted to the treatment of the petitioners' contention. The South Carolina Supreme Court traced the history of its decisions and interpretations and found that the pay under protest statute was the petitioners' appropriate remedy.

The petitioners would have this court believe that all of their problems were created by the respondents. Such,

however, is not the case. The petitioners are retired federal employees. As such, they have or should have a greater knowledge of federal law that relates to them. Equally significant, they must have known that the federal government was not bound by their acts if the same were beyond their authority. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 68 S.Ct. 1 (1947); *United States v. Stewart*, 311 U.S. 60, 61 S.Ct. 102 (1940). For other federal cases see West's Federal Digest, *United States*, Key 40. This is the same rule in this state. An administrative body cannot materially alter or add to the law. *Lee v. Michigan Millers Mutual Ins. Co.*, 250 S.C. 462, 158 S.E. 2d 774 (1968). This rule was applied to an administrative interpretation of the respondent, South Carolina Tax Commission, that was made without statutory authority. *Heyward v. South Carolina Tax Commission*, 240 S.C. 347, 126 S.E. 2d 15 (1968).

Surely the petitioners cannot be serious in their contention that the Tax Commission or other state employees could waive the state's immunity to suit. It is settled that no federal employee or officer can waive the immunity of the federal government from suit nor can they confer jurisdiction to a court. *United States v. New York Rayon Importing Co.*, 329 U.S. 654, 67 S.Ct. 601 (1947). The same rule applies in this State. *Lee v. Michigan Millers Mutual Ins. Co.*, supra, *Heyward v. South Carolina Tax Commission*, supra.

Exception is taken to the petitioners' allegations that the respondent, South Carolina Tax Commission, "Advised petitioners to pursue refund claims under S. C. Code Ann. § 12-47-440." The basis for this allegation presumably is the press releases of the South Carolina Tax Commission. Nowhere will one find mention of § 12-47-440 in these releases. Nowhere will one find a statement by the Tax Commission that the refunds would be issued. Instead, the

releases clearly state that the Tax Commission could not issue refunds without legislative or judicial direction.

From 1945 to 1989, the tax was voluntarily paid under a statute that all presumed to be lawful. At no time did any federal retiree raise any question concerning the federal statute. Can they now be held blameless to the detriment of the vast majority of the state's citizens? We think not.

It is further respectfully submitted that the petitioners incorrectly state that whether § § 12-47-210 and 12-47-220 constituted the petitioners' only remedy was not alleged. Such, however, was alleged in the respondents' Answer. Notwithstanding, whether or not raised, it is an inherent power of a court to determine the parameter of its jurisdiction and that of the lower court.

> And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. *United States, et al. v. Carrick*, et al., 298 U.S. 435, 56 S.Ct. 829 (1936). For similar state holding see *City of Columbia v. S.C. Public Service Commission*, 242 S.C. 528, 131 S.E. 2d 705 (1963).

The court of its own motion can resolve jurisdictional questions whether or not presented by the parties.

The decision of the South Carolina Supreme Court is the correct interpretation of state law. It is neither arbitrary nor adverse. The petition should be dismissed.

ARGUMENT III

THE *DAVIS* DECISION IS TO BE PROSPECTIVELY APPLIED.

It is respectfully submitted that this Honorable Court did not rule in *Davis* that the decision was to be retrospectively applied. Additionally, the decisions in *Davis* and in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed. 2d 200 (1984) are distinguishable. Prospectivity was an issue in *Bacchus*; it was not in *Davis*. Hawaii denied that the refunds were to issue; Michigan conceded the same. This Honorable Court remanded *Bacchus* for the Hawaii Court to consider the refund issue. The remand to the Michigan Supreme Court was for the purpose of formulating a procedure to correct the unlawful taxation for future years. As the South Carolina Supreme Court held, Michigan did not interpret *Davis* to be retrospective. Other retirees were not refunded the tax because of *Davis*.

Much argument has been made concerning the retrospective or prospective application of *Davis* and of the decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. _____, 111 S.Ct. 2439 (1991). The South Carolina Supreme Court and other courts have held that *Beam* did not mandate retrospective treatment of *Davis*. Their treatment of this issue is exhaustive and will not be restated in this brief. Instead, the respondents submit what they perceive to be an argument not previously made and that in the respondents' view requires consideration. It is that the action herein is governed by equitable principles.

On this issue, we find the language in *American Trucking Association, Inc. v. Smith*, 110 S.Ct. 2323 (1990), to be refreshing. The minority in *American Trucking*, supra, is now the majority of the plurality in *James B. Beam Distilling Co. v. Georgia*, supra. The minority there accepted the premise that where the Court has equity discretion, it may apply its decision prospectively. Because of such, we quote at length from the language of the dissent in *American Trucking* as follows:

> . . . Close examination of Chevron Oil and its progeny reveals that those cases establish a remedial principle for the exercise of equitable discretion by federal courts and not, as the plurality states, a choice of law principle applicable to all cases on direct review.

110 S.Ct. p. 2353.

> . . . We stressed that a court considering the retroactive effect of a decision establishing a new principle of law should consider remedial issues such as the purpose and effect of the rule in question and the inequity imposed by retroactive application. . .

110 S.Ct. p. 2353.

> More fundamentally, however, Chevron Oil involved the application of a statute of limitations, an area over which the federal courts historically have asserted equitable discretion to craft rules of tolling, laches, and waiver. . .

110 S.Ct. p. 2354.

> . . . When the federal courts have no equitable discretion, we have held a federal court has no authority to refuse to apply a law retroactively. . .

110 S.Ct. p. 2354.

> . . . "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots." . . .

110 S.Ct. p. 2355.

From such, it is apparent that the minority in *American Trucking* concedes that prospective application of the Court's decision may be appropriate when the Court has equitable discretion. The holdings of this Honorable Court are that actions to recover taxes are governed by equitable principles.

In *Stone v. White*, 301 U.S. 532, 57 S.Ct. 851, 81 L.Ed. 1265 (1937), this Honorable Court held that although an action to recover a tax was one at law, it was governed by equitable principles. The court held:

> ... The statutes authorizing tax refunds and suits for their recovery are predicated upon the same equitable principles that underlie an action in assumpsit for money had and received. United States v. Jefferson Electric Mfg. Co., 291 U.S. 386, 402, 54 S.Ct. 443, 449, 78 L.Ed. 859...

It is significant to note the language of *United States v. Jefferson Electric Mfg. Co.*, 291 U.S. 386, 402, 54 S.Ct. 443, 449, 78 L.Ed. 859 (1934), concerning this principle:

> "This is often called an equitable action and is less restricted and fettered by technical rules and formalities than any other form of action. *It aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which ex aequo et bono belongs to the plaintiff.* It was encouraged and, to a great extent, brought into use by that great and just judge, Lord Mansfield, and from his day to the present, has been constantly resorted to in all cases coming within its broad principles. It approaches nearer to a bill in equity than any other common law action." (Emphasis added)

Black's Law Dictionary defines the term "ex aequo et bono" to mean:

> A phrase derived from the civil law, meaning, in justice and fairness; according to what is just and good; according to equity and conscience.

In *Stone v. White*, supra, at p. 853, the Court further held that:

> . . . Since, in this type of action, the plaintiff must recover by virtue of a right measured by equitable standards, it follows that it is open to the defendant to show any state of facts which, according to those standards, would deny the right . . .

It is thus respectfully submitted that the *Davis* decision has not foreclosed its prospective application to this case. No consideration has been given to the equities of this case.

Equity is an integral part of law and justice. To conclude that *Davis* applies throughout the nation without any consideration of equity to the retirees and states other than Michigan should not be accepted. It cannot be the law because of the injustice that results from the federal retirees' voluntary payment of the tax.

If South Carolina is bound by *Davis* because of Michigan's concession that it would refund the tax, then no consideration is given to the circumstances and facts that warrant a different result in South Carolina. If the Court, to establish equality, is to look no further than the fact that both South Carolina and Michigan collected the tax, then it is respectfully submitted that it will stop short of its duty to render equity and justice. A consideration of facts favorable only to the refund claimants fails to establish equality. Equal treatment requires a consideration of the facts applicable to both parties. Equity and

justice in this case must be based upon the fact that the tax when collected was presumed to have been properly collected, that the retirees had voluntarily paid the tax for almost forty-five years,[1] that the State took immediate action to correct the wrong, that the funds had been expended for the public good, that the retirees enjoyed the benefits of such expenditures, that more than ninety-eight percent (98%) of the State's population would primarily suffer the burden of funding the refund of Two Hundred Million ($200,000,000) Dollars, that the State has no funds from which the refunds can be made and that because of such, added taxes or curtailed services would be necessary for the refunds to issue. A refund of these payments cannot be equity and justice under the facts and circumstances here involved.[2]

Additionally as "choice of law", there can be but one just conclusion, *Davis* must be prospectively applied because equity and the ends of justice demand such. To follow stare decisis and apply a rule of law to other cases without a consideration of all pertinent and controlling facts cannot be a "choice of law". The State and the South Carolina Tax Commission respectfully submit that no one rule can dispense justice upon different factual considerations. The issue is not whether the collection was improper. The issue instead is

---

[1]Additional evidence that the retirees never raised the issue involved in *Davis*, is found in *Scott v. South Carolina Tax Commission*, 262 S.C. 144, 202 S.E. 2d 854 (1974). In that case, a retired naval commander questioned the taxation of certain of his income, however, failed to raise the *Davis* issue.

[2]"Equity, after all, ministers to the vigilant, not to those who slumber upon their rights." *Sandstrom v. Chemlawn Corp.*, 904 F. 2d 83 (1st Cir. 1990). For other cases see 8A S.C. Digest, *Equity*, Key 64. The retirees had a remedy to contest the tax for each of the almost forty-five years the same was paid.

whether the refunds must issue without regard to the facts and circumstances that would otherwise preclude the same.

The issue whether a new rule of law established by a judicial ruling is to be applied prospectively or retrospectively has its foundation in equity.

It is thus respectfully submitted that the prospective application of the *Davis* decision to this case is not foreclosed by *Beam*. The choice of law is a federal question and because of such, this Court, in considering this issue, must exercise its equitable discretion. Having failed to consider such discretion, the Court accordingly reserved the issue of whether *Davis* was retrospective or prospective. *Davis* should, therefore, be prospectively applied.

CONCLUSION

The respondents respectfully submit that the petition herein should be denied and this action ended.

Respectfully submitted,

JOE L. ALLEN, JR. *
RAY N. STEVENS
ARLENE D. HAND
PO Box 125
Columbia, South Carolina 29214
(803) 737-4430
Attorneys for Respondents

* Counsel of Record.

May 11, 1992.